

SUPREME COURT OF ARKANSAS

No. 06-625

IN RE: ADOPTION OF
AMENDMENT TO RULE 1.15,
ARKANSAS RULES OF
PROFESSIONAL CONDUCT,
AND ENABLING POWERS FOR
THE ARKANSAS IOLTA
FOUNDATION, INC.

Opinion Delivered November 30, 2006

PER CURIAM

The Arkansas IOLTA Foundation, Inc., filed a petition with the court proposing to revise Rule 1.15 of the Arkansas Rules of Professional Conduct and seeking certain powers for the IOLTA Board of Directors. The proposal was published for comment. *See In Re: Proposed Amendment to Rule 1.15, Arkansas Rules of Professional Conduct, and Enabling Powers for the Arkansas IOLTA Foundation, Inc.* (June 29, 2006). The objectives of the proposed amendments were summarized as follows:

The changes proposed in this Petition relate primarily to a wider variety of new banking products ... to the types of financial institutions that may hold IOLTA accounts, and to certain banking practices ... that negatively impact attorney IOLTA revenue. In addition, the Petition seeks enabling powers for the Foundations's Board.

Id.

We thank those who reviewed the proposal and submitted comments. We agree with the proposal but have restructured it somewhat. In addition, in response to a

comment, language has been added in (c)(3)(i-ii), setting out notice and cure provisions concerning a bank's removal from the IOLTA program. The changes in the rule are illustrated at the end of this order.

We adopt, effective February 1, 2007, the amendments to Rule 1.15 of the Arkansas Rules of Professional Conduct, including the enabling powers for the Arkansas IOLTA Foundation Board, all as set out below, and republish the rule in its entirety.

RULE 1.15. SAFEKEEPING PROPERTY AND TRUST ACCOUNTS

(a) Safekeeping property.

- (1) A lawyer shall hold property of clients or third persons, including prospective clients, that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.
- (2) Property, other than funds of clients or third persons, shall be identified as such and appropriately safeguarded.
- (3) Complete records of trust account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after the termination of the representation or the last contact with a prospective client.
- (4) A lawyer shall maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any record keeping rules established by law, rule, or court order.
- (5) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person in writing. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full written accounting regarding such property

to the client or third persons.

(6) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(b) Trust Accounts: IOLTA trust accounts and non-IOLTA trust accounts.

(1) Funds of a client shall be deposited and maintained in one or more separate, clearly identifiable trust accounts in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person.

(2) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(3) A lawyer may deposit funds belonging to the lawyer or the law firm in a client trust account for the sole purposes of paying bank services charges on that account, or to comply with the minimum balance required for the waiver of bank charges, but only in the amount necessary for those purposes, but not to exceed \$500.00 in any case. Such funds belonging to the lawyer or law firm shall be clearly identified as such in the account records.

(4) Each trust account referred to in section (b)(1) shall be an interest- or dividend-bearing account held at an eligible institution.

(5) Each such trust account shall provide overdraft notification to the Executive Director of the Office of Professional Conduct for the purpose of reporting whenever any properly payable instrument is presented against a lawyer trust account

containing insufficient funds, irrespective of whether or not the instrument is honored. The financial institution shall report simultaneously with its notice to the lawyer the following information:

(i) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(ii) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of overdraft created thereby.

(6) A lawyer who receives client funds which, in the judgment of the lawyer, are nominal in amount, or are expected to be held for such a short period of time that it is not practical to earn and account for income on individual deposits, shall create and maintain an interest-bearing, multi-client trust account ("IOLTA" account) for such funds. The account shall be maintained in compliance with the following requirements:

(i) The trust account shall be maintained in compliance with sections (b)(1) - (b)(5) of this Rule and the funds shall be subject to withdrawal upon request and without delay;

(ii) No earnings from the account shall be made available to the lawyer or law firm; and,

(iii) The interest accruing on this account, net of allowable reasonable fees, shall be paid to the Arkansas IOLTA Foundation, Inc. All other fees and transaction costs shall be paid by the lawyer or law firm.

(7) All client funds shall be deposited in the account specified in section (b)(6), unless they are deposited in a separate interest-bearing account ("non-IOLTA" account) for a specific and individual matter for a particular client. There shall be a separate account opened for each such particular client matter. Interest so earned must be held in trust as property of each client in the same manner as is provided in this Rule.

(8) The decision whether to use an "IOLTA" account specified in section (b)(6) or a "non-IOLTA" account specified in section (b)(7) is within the discretion of the lawyer. In making this determination, consideration should be given to the following:

- (i) The amount of interest which the funds would earn during the period they are expected to be deposited; and,

- (ii) The cost of establishing and administering the account, including the cost of the lawyer's or law firm's services.

(9) Every lawyer practicing or admitted to practice in this State shall, as a condition thereof, be conclusively deemed to have consented to the reporting requirements mandated by this rule. All lawyers shall certify annually that they, their law firm or professional corporation is in compliance with all sections and subsections of this Rule.

(10) A lawyer shall certify, in connection with the annual renewal of the lawyer's license, that the lawyer is complying with all provisions of this rule. Certification shall be made on a form provided by and in a manner designated by the Clerk of the Supreme Court.

(11) A lawyer or a law firm may be exempt from the requirements of this rule if the Arkansas IOLTA Foundation's Board of Directors, on its own motion, has exempted the lawyer or law firm from participation in the Program for a period of no more than two years when service charges on the lawyer's or law firm's trust account equal or exceed any interest generated.

(c) IOLTA Foundation relationship with eligible and member institutions.

(1) DEFINITIONS. As used in this rule, the terms below shall have the following meaning:

(i)“IOLTA account” means an interest- or dividend-bearing trust account benefitting the Arkansas IOLTA Foundation, Inc. established in an eligible institution for the deposit of nominal or short-term funds of clients or third persons, which may be withdrawn upon request as soon as permitted by law.

(ii)“Eligible institution” for IOLTA accounts means a depository bank or savings and loan association or credit union authorized by federal or state laws to do business in Arkansas, whose deposits are insured by an agency of the federal government, or any open-end investment company registered with the Securities and Exchange Commission and authorized by federal or state laws to do business in Arkansas. In addition, an eligible institution must either (1) maintain a physical office in the state of Arkansas or (2) be owned by a bank holding company regulated by the Federal Reserve System, of which a subsidiary federally-insured depository bank or savings and loan association or credit union maintains a physical office in the state of Arkansas. Eligible institutions must meet the requirements set out in section (b) above.

(iii)“Interest- or dividend-bearing trust account” means a federally insured checking account or an investment product, including a sweep product and a daily (overnight) financial-institution repurchase agreement or an open-end money market fund. A daily financial-institution repurchase agreement must be fully collateralized by U.S. Treasury Securities; an open-end money-market fund must invest primarily in U.S. Treasury Securities or repurchase agreements fully collateralized by U.S. Treasury Securities. A daily financial-institution repurchase agreement may be established only with an eligible institution that is “well capitalized” or “adequately capitalized” as those terms are defined by applicable federal statutes and regulations. An open-end money-market fund must hold itself out as a money-market fund as defined by applicable federal statutes and regulations under the Investment Company Act of 1940 and, at the time of investment, have total managed assets of at least \$250,000,000. The funds covered by this rule shall be subject to withdrawal upon request and without delay.

(iv) “Allowable reasonable fees” means: (1) per check charges, (2) per deposit charges, (3) a fee in lieu of minimum balance, (4) federal deposit insurance fees, (5) sweep fees, 12b-1 fees, and subaccounting fees, and (6) a reasonable IOLTA account administrative fee.

(v) “U.S. Treasury Securities” means direct obligations of the federal government of the United States.

(vi) “Repurchase agreements” means transactions in which a fund buys a security from a dealer or bank and agrees to sell the security back at a mutually agreed-upon time and price. The repurchase price exceeds the sale price, reflecting the fund’s return on the transaction. This return is unrelated to the interest rate on the underlying security. Repurchase agreements are subject to credit risks.

(2) Participation in the IOLTA program is voluntary for banks, savings and loan associations, and investment companies. Any eligible institution that elects to provide and maintain IOLTA accounts shall do so according to the following terms:

(i) Determination of Interest Rates and Dividends. Eligible institutions that maintain IOLTA accounts that are, or are invested in, interest-bearing deposits or daily financial-institution repurchase agreements shall pay no less than the highest rate and dividend generally available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other eligibility qualifications, if any. In determining the highest rate or dividend generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors, in addition to the balance in the IOLTA account, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers, and that these factors do not include the fact that the account is an IOLTA account. The eligible institution may offer, and the lawyer may accept, a sweep account that provides a mechanism for the overnight investment of balances in the IOLTA account into a daily financial institution repurchase agreement or a money-market fund. However, this Rule shall not require any eligible institution to offer or otherwise make available sweep accounts for IOLTA accounts.

(ii) Written Agreements. There shall be a written agreement between the lawyer and the eligible institution, designating interest on the IOLTA account be remitted to the Arkansas IOLTA Foundation, Inc. on a monthly basis.

(iii) Interest Rates and Dividends. Eligible institutions shall maintain IOLTA accounts that pay the highest interest rate or dividend generally available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other account eligibility qualifications, if any.

(iv) Reasonable Fees. Reasonable fees means (1) per check charges, (2) per deposit charges, (3) a fee in lieu of minimum balances, (4) federal deposit insurance fees, (5) sweep fees, 12b-1 fees, and subaccounting fees, and (6) a reasonable IOLTA account administrative fee. Reasonable fees are the only service charges or fees permitted to be deducted from interest earned on IOLTA accounts. Reasonable fees may be deducted from interest on an IOLTA account only at such rates and under such circumstances as is the eligible institution's customary practice for all of its customers with interest-bearing accounts. All other fees and charges shall not be assessed against the accrued interest on the IOLTA account but rather shall be the responsibility of, and may be charged to, the lawyer maintaining the IOLTA account.

(v) Negative Netting Prohibited. Fees or charges in excess of the interest earned on the account for any month shall not be taken from interest earned on other IOLTA accounts or from the principal of the account.

(vi) Reporting Requirements. A statement should be transmitted monthly to the Arkansas IOLTA Foundation, Inc. with each remittance showing the period for which the remittance is made, the name of the lawyer or law firm from whose IOLTA account the remittance is being sent, the IOLTA account number, the average daily rate applied, the gross interest or dividend earned during the period, the amount and description of any service charges or fees assessed during the remittance period, and the net amount of interest or dividend remitted for the period. The Foundation supplies a monthly remittance form tailored to each bank listing the required information; however, should the bank elect to generate its own report, the requirements in this section must be addressed.

(3) In addition to the attorney trust account "automatic overdraft" notification procedures set out in Section 28 of the Procedures of the Arkansas Supreme Court regulating professional conduct of attorneys at law:

(i) Banks may only be removed from the IOLTA program after notice from the Foundation to the bank of the action needed to correct or implement any needed changes and a timely response from the bank.

(ii) Should a bank be removed from the IOLTA program, the Foundation will give attorneys sufficient notice and time in order to move their IOLTA accounts to another participating bank.

COMMENT:

[1] A lawyer should hold property of others with the care required of a professional

fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b)(3) provides it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the trust account funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fee owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed of the funds shall be promptly distributed.

[4] Paragraph (a)(6) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third party claim is not frivolous under applicable law, the lawyer must refuse to surrender property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

ILLUSTRATION OF CHANGES

(Language removed is struck through; new language is underlined.)

...

(b) Trust Accounts: IOLTA trust accounts and non-IOLTA trust accounts.

(4) Each trust account referred to in section (b)(1) shall be an interest- or dividend-bearing account held at an eligible institution.

~~(4) Each trust account referred to in section (b) (1) shall be an interest-bearing trust account in a bank, savings bank, trust company, savings and loan association, savings association, credit union, or federally regulated investment company, and the institution shall be insured by an agency of the federal government.~~

...

(6) A lawyer who receives client funds which, in the judgment of the lawyer, are nominal in amount, or are expected to be held for such a short period of time that it is not practical to earn and account for income on individual deposits, shall create and maintain an interest-bearing, multi-client trust account ("IOLTA" account) for such funds. The account shall be maintained in compliance with the following requirements:

(i) The trust account shall be maintained in compliance with sections (b)(1) - (b)(5) of this Rule and the funds shall be subject to withdrawal upon request and without delay;

(ii) No earnings from the account shall be made available to the lawyer or law firm; and,

(iii) The interest accruing on this account, net of allowable reasonable fees, shall be paid to the Arkansas IOLTA Foundation, Inc. All other fees and

transaction costs shall be paid by the lawyer or law firm.

~~(iii) The interest accruing on this account, net of reasonable check and deposit processing charges which shall only include any items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge, shall be paid to the Arkansas IOLTA Foundation, Inc. All other fees and transaction costs shall be paid by the lawyer or law firm.~~

~~...~~

~~(8) The interest paid on the account shall not be less than, nor the fees and charges—
—assessed greater than, the rate paid or fees and charges assessed, to any non-lawyer customers on accounts of the same class within the same institution.~~

~~...~~

~~(9) All lawyers who maintain accounts provided for in this Rule, must convert their—
client trust account(s) to interest-bearing account(s) with the interest to be paid to the
Arkansas IOLTA Foundation, Inc. no later than six months from the date of the order
adopting this Rule, unless the account falls within subsection (b)(8). Every lawyer
practicing or admitted to practice in this State shall, as a condition thereof, be
conclusively deemed to have consented to the reporting requirements mandated by this
rule. All lawyers shall certify annually that they, their law firm or professional corporation
is in compliance with all sections and subsections of this Rule.~~

(c) IOLTA Foundation relationship with eligible and member institutions.

[Entire section is new]